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No. 94-___

In The
Supreme Court of the United States
October Term, 1994

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION,

Petitioner/Respondent,

v.

JOSEPH P. MAZUREK, as Attorney General for the State of Montana; and MARK HARSHMAN, as County Attorney for Blaine County, Montana,

Respondents/Cross-Petitioners.

On Petition for Writ of Certiorari From An Appeal To The United States Court of Appeals For The Ninth Circuit

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CROSS-PETITION FOR WRIT OF CERTIORARI

JOSEPH P. MAZUREK
Attorney General
CLAY R. SMITH
Solicitor
HARLEY R. HARRIS*
Assistant Attorney General
Justice Building
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
**Counsel of Record*

15pp

QUESTIONS PRESENTED

1. May a federal court refuse to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), if the federal plaintiff alleges that the subject state criminal prosecution is preempted by federal law?

2. Does *Younger v. Harris* require a federal court to abstain from exercising jurisdiction over a case seeking to enjoin an ongoing state criminal proceeding where the federal action is brought by a third party having a common interest with the state criminal defendant and who uses the state proceedings as the predicate for the relief requested from the federal court?

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Respondents/Cross-Petitioners Joseph P. Mazurek, as Attorney General for the State of Montana, and Mark Harshman, as County Attorney for Blaine County, Montana, respectfully submit a cross-petition for writ of certiorari.

OPINION BELOW

The decision of the Court of Appeals affirming the district court's denial of Respondents/Cross-Petitioners' motion to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), is reproduced at Pet. App. 1 in No. 94-1728, and is reported officially at 43 F.3d 428 (9th Cir. 1994).

JURISDICTION

The Ninth Circuit Court of Appeals entered its order and judgment on December 16, 1994. On March 15, 1995, Petitioner filed a petition for a writ of certiorari that did not conform with Sup. Ct. R. 33. Respondents/Cross-Petitioners received a copy of a conforming petition on May 22, 1995. Respondents/Cross-Petitioners submit this cross-petition for a writ of certiorari within thirty days of that date in accordance with Sup. Ct. R. 12.3.

CONSTITUTIONAL PROVISIONS AND STATUTES

This cross-petition for a writ of certiorari involves the application of the abstention doctrine developed in *Younger v. Harris*, 401 U.S. 37 (1971), and later cases, and does not involve the application of any specific constitutional or statutory provision.

STATEMENT OF THE CASE

Respondents/Cross-Petitioners' statement of the case is set forth in their Brief in Opposition to Petition for Writ of Certiorari in No. 94-1728.

REASONS FOR GRANTING THE CROSS-PETITION

I. The Court of Appeals' Abstention Decision Conflicts With Decisions of This Court Holding That the Determination of an "Important State Interest" Under *Younger v. Harris* Does Not Involve a Consideration of Allegedly Countervailing Federal Interests.

It is now well established that a federal court should decline jurisdiction when it has been asked to take action that threatens to interfere with (1) an ongoing state proceeding; (2) involving an important state interest; and (3) in which there is an adequate opportunity to raise the involved federal question. *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 627 (1986); *Middlesex Co. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). The Court of Appeals' *Younger* analysis focused solely on the second prong: whether Montana had an "important state interest" in the criminal prosecution of Indians violating state liquor laws.

While specifically recognizing that Montana has "an unquestionable interest in the liquor traffic that occurs within its borders" (Pet. App. at 16, *quoting Rice v. Rehner*, 463 U.S. 713, 724 (1983)), the Court of Appeals nevertheless held that "Montana cannot demonstrate an important state interest" (Pet. App. at 9), for the purposes of *Younger*, explaining:

> The threshold question in this case is whether Montana has jurisdiction to prosecute Indians in state court for violation of state liquor laws. Although the Supreme Court has already determined that states may regulate liquor transactions on Indian reservations, the question of a state's jurisdiction to prosecute is one of first impression. It is an issue of federal law. The state undoubtedly has an interest in enforcing its liquor laws, but only if federal law gives it jurisdiction to do so for violations that occur on an Indian reservation. Because the jurisdictional question is paramount and federal, *Younger* abstention would not be appropriate here.

Pet. App. at 10-11 (citation omitted). In reaching this conclusion, the court drew from *Sycuan Band of Mission Indians v. Roache*, 38 F.3d 402 (9th Cir. 1994), which in turn relied on *Gartrell Construction Inc. v. Aubry*, 940 F.2d 437 (9th Cir. 1991), for the proposition that "no significant state interest is served where the state law is preempted by federal law." *Id.* at 440.[1]

The Court of Appeals' error lies in its failure to adhere to this Court's decision in *New Orleans Public Service, Inc. v.*

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[1]The genesis of this line of reasoning appears to be a district court decision, *Empire Inc. v. Ashcroft*, 524 F. Supp. 898, 901 (W.D. Mo. 1981). It has found currency in the ninth, *see, e.g., Bud Antle Inc. v. Barbosa*, 45 F.3d 1261, 1272-73 (9th Cir.) (*pet. for cert. pending, Agricultural Labor Relations Bd. v. Bud Antle, Inc.*, No. 94-1684); *Champion Int'l Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984); tenth, *see Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989); and eleventh circuits. *See Baggett v. Department of Professional Reg. Bd. of Pilot Comm'rs*, 717 F.2d 521 (11th Cir. 1983).

Council of the City of New Orleans, 491 U.S. 350 (1989) ["*NOPSI*"]. *NOPSI* makes clear that the determination of an "important state interest" under *Younger* does not involve a weighing or consideration of arguably competing federal interests. In *NOPSI* the Court addressed whether *Younger* abstention was warranted in deference to an ongoing state ratemaking proceeding. While ultimately holding it was not,[2] the Court first examined whether the proceedings at issue involved an "important state interest." As here, the underlying dispute in *NOPSI* involved an allegation that the subject state law was preempted by federal law. The *NOPSI* petitioner thus contended:

> *Younger* cannot bar a federal court adjudication when, as here, the federal claim is that the state's jurisdiction to conduct the proceeding is ousted by federal law and that the state, therefore, may have no "legitimate" or "important" substantive interest.

Pet. Br. at 32, *NOPSI* (No. 88-348); *see also* United States Br. at 22, *supra*. Observing that in *Younger* itself the involved state law was alleged to be constitutionally invalid (*NOPSI*, 491 U.S. at 366; *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 600 (1974)), the Court responded:

> We disagree. There is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state action, no less than preemption-based challenges, call into

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[2]The *NOPSI* Court held that abstention under *Younger* was inappropriate because the underlying administrative rulemaking proceeding was not "judicial in nature" (491 U.S. at 370-71)--a question not at issue here.

> question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action.

NOPSI, 491 U.S. at 365. The Court went on to explain:

> [W]hen we inquire into the substantiality of the State's interests in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case--which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State.

Id. (emphasis in original). The Court of Appeals thus employed "too narrow an analytical focus" (*NOPSI*, 491 U.S. at 366) when it measured the substantiality of Montana's interests by reference to the specific prosecution of the Browns rather than focusing on Montana's undisputed "generic" interest in enforcing, through criminal sanction, its laws relating to the sale and distribution of liquor.

The Court of Appeals' analysis collapses the decision as to whether *Younger* abstention is appropriate in a determination of the preemption claim's merits. *See also Bud Antle*, 45 F.3d at 1272-73; *Sycuan Band*, 38 F.3d at 408-11; *Seneca-Cayuga Tribe*, 874 F.2d at 712-14. This is precisely the "quick look at the merits" rejected in *NOPSI*. 491 U.S. at 364. Should it be accepted, virtually every preemption claim will be captured by this approach. Only the clearly frivolous would not, and all others would invite highly subjective and essentially advisory decisionmaking by lower courts concerning the relative strength of an otherwise arguable claim. *See generally Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987); *Moore v. Sims*, 442 U.S. 415, 428 (1979).

The Court of Appeals' decision also manifests a distrust of state courts' ability to adjudicate federal issues fairly--a mistrust which has resulted in an unseemly and unnecessary disruption of otherwise orderly state criminal proceedings that cannot be squared with the principles of comity and federalism that animate *Younger*. *See, e.g., Pennzoil*, 481 U.S. at 15; *Moore*, 442 U.S. at 430; *Huffman*, 420 U.S. at 610-11. In the end, the Court of Appeals' approach threatens to render *Younger* a nullity.[3]

II. This Case Presents the Court With an Opportunity to Clarify That Abstention Under *Younger v. Harris* Is Required Where a Federal Action Is Brought to Restrain an Ongoing State Criminal Proceeding by a Third Party Having a Common Interest With the State Court Defendant and Who Bases the Existence of a Justiciable Controversy on the State Prosecution.

While the Court of Appeals did not reach the issue, the District Court denied the Respondents/Cross-Petitioners' *Younger* motion on an alternative basis. After first observing that "*Younger* does not bar individuals who are nonparties in the related state proceedings, who possess the requisite standing in federal court, from seeking federal relief" (Opp. App. at 4, *citing Doran v. Salem Inc.*, 422 U.S. 922, 927-29 (1975)), the District Court went on to hold that "[b]ecause the [Petitioner] . . . possesses standing to prosecute this action . . . the state is precluded from relying on the *Younger* abstention doctrine to preclude the [Petitioner] from obtaining the declaratory relief requested." *Id.* The District Court's analysis thus raises the question of whether the *Younger* disability that

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[3]Respondents/Cross-Petitioners advise the Court that this same issue is raised in the petition for certiorari in *Agricultural Labor Relations Board v. Bud Antle, Inc.*, No. 94-1684.

would attend this action had it been brought by the Browns should be imputed to the Petitioner.

While the District Court was correct in observing that a *Younger* defense is normally limited to parties actually involved in the state proceeding (*Doran*, 422 U.S. at 929-31), this Court has nevertheless observed that some persons may be "so closely related that they should be subject to the *Younger* considerations which govern any one of them." *Doran*, 422 U.S. at 928. In his concurring opinion in *Allee v. Medrano*, 416 U.S. 802 (1974), then-Chief Justice Burger suggested that *Younger* imputation was appropriate when there was an "identity of interest" (*id.* at 830 (Burger, C.J., concurring in part and dissenting in part)) between the federal plaintiff and the state criminal defendant and the federal action was specifically brought to affect or otherwise restrain the pending state prosecution. *Id.* at 831. When such circumstances are presented:

> The same comity considerations apply whether the action is brought in the name of the [state court defendant] or in the name of the [interested federal plaintiff], and there is no inequity in requiring the [interested federal plaintiff] to abide by the same legal standards as [the state court defendant] suing in federal court.

Id.; *see also Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975). In *Stivers v. Minnesota*, 575 F.2d 200, 203 (8th Cir. 1978), the court of appeals observed that imputation was particularly appropriate where the federal plaintiff relied upon the interests of the state court defendant in order to establish its standing to bring the federal action. *Accord Hjelle v. Brooks*, 424 F. Supp. 595 (D. Alaska 1976).

The *Allee* factors are present here. The arguments presented by the Browns in the state court proceedings are identical to those raised by the Petitioner in this case. Furthermore, the Petitioner specifically relied upon the Browns' interests to establish a justiciable controversy (Opp. App. at 9-14) and did not allege that either it or any Indian other than the Browns is engaged in, or intends to engage in, the possession and sale of alcoholic beverages without complying with Montana law. *Id.* The theoretical possibility of a state prosecution against the Petitioner or Indians other than the Browns does not, without more, create a justiciable controversy. *See, e.g., Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979); *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974). Any harm to Petitioner's interests necessarily derives from the Browns' prosecution and, as such, should be burdened with the same disabilities as the Browns' had they brought the federal action. *See, e.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 516 (1975). The Petitioner simply cannot avoid the otherwise clear applicability of *Younger* by nominally maintaining this action on its own behalf but seeking relief whose principal--indeed only--effect will be to restrain or otherwise affect the Browns' prosecution.

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CONCLUSION

If the Court grants the petition for a writ of certiorari, the Respondents/Cross-Petitioners respectfully request the Court to also grant this cross-petition for a writ of certiorari.

Respectfully submitted,

JOSEPH P. MAZUREK
Attorney General
CLAY R. SMITH
Solicitor
HARLEY R. HARRIS*
Assistant Attorney General
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

**Counsel of Record*

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